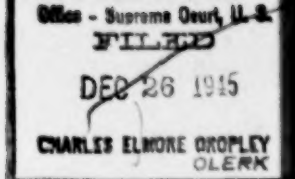


30



SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 692

YORK ENGINEERING AND CONSTRUCTION
COMPANY,

Petitioner,

vs.

THE UNITED STATES

**PETITION FOR A WRIT OF CERTIORARI TO THE
COURT OF CLAIMS AND BRIEF IN SUPPORT
THEREOF**

ROBERT P. SMITH,
CHARLES S. COLLIER,
Counsel for Petitioner.

INDEX

	Page
Petition for writ of certiorari and brief in support . .	1
Opinion below	1
Jurisdiction	1
Questions presented	2
Statutes and regulations involved	3
Statement of the case	8
Specification of errors	12
Reasons for granting the writ	14
Conclusion	15
Brief in support of petition	17

CITATIONS

Cases:

<i>Black v. Woodrow</i> , 39 Md. 194	19
<i>Frazier-Davis Construction Co. v. The United States</i> , 100 C. Cls. 120	23
<i>Lynch v. The United States</i> , 292 U. S. 571; 54 S. Ct. 840; 78 L. Ed. 1434	31
<i>Perry v. The United States</i> , 294 U. S. 30; 55 S. Ct. 432; 79 L. Ed. 912	31
<i>Seeds & Durham v. The United States</i> , 92 C. Cls. 97 . .	23
<i>United States v. Butler</i> , 297 U. S. 1; 56 S. Ct. 312; 80 L. Ed. 477	35, 36
<i>Young-Fehlhaber Pile Co. v. The United States</i> , 90 C. Cls. 4	14, 18

Statutes and Regulations Involved:

Federal Emergency Relief Act of May 12, 1933, 48 Stat. 55, as amended by Act of February 15, 1934, 48 Stat. 351; 15 U. S. C. A., Sec. 721-728	3
Executive Order No. 6442, November 22, 1933, 15 U. S. C. A., Sec. 721-728	3
Emergency Relief Appropriation Act of April 8, 1935, 49 Stat. 119, 15 U. S. C. A., Sec. 721-728	4
Executive Order No. 7060, June 5, 1935	7

Resolution of June 29, 1937, 50 Stat. 352, as amended	
June 21, 1938, 52 Stat. 817, 15 U. S. C. A., Sec.	
721-728	4, 13, 29
Act of July 23, 1937, 50 Stat. 533, Chap. 520	6
Resolution of June 21, 1938, 52 Stat. 809, 15 U. S.	
C. A., Sec. 721-728	5

Other Authorities:

Restatement of the Law—Contracts, Sec. 315	31
--	----

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1945

No. 692

YORK ENGINEERING AND CONSTRUCTION
COMPANY,

Petitioner,

vs.

THE UNITED STATES,

Respondent

**PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF CLAIMS**

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Claims in the above-entitled case.

Opinion Below

The opinion of the Court of Claims (R. 78) is not yet officially reported.

Jurisdiction

The judgment of the Court of Claims was entered October 1, 1945 (R. 90-91). The judgment of this Court is invoked under Section 3(b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

Questions Presented

First. Whether, in cases where the United States requires parties contracting with it to employ (except for supervisory, administrative and highly skilled workers) only persons referred for assignment to such work by the United States Employment Service and requires that at least ninety per centum of the persons employed shall have been taken from the public relief rolls, the United States is or is not under an implied contractual obligation either to supply and furnish to the contractor an adequate number of such persons, or to waive this contractual requirement.

Second. Whether the provisions of the Emergency Relief Acts, 49 Stat. 115 as amended by 50 Stat. 352, which recite that no person shall be retained in employment on the classes of public projects, Federal and non-Federal, set forth therein who is certified for relief and who refuses a bona fide offer of private employment under reasonable working conditions and with equivalent or better compensation, *do or do not have the legal effect of making the failure of officers of the United States to comply with and faithfully enforce these statutory requirements a breach of contract on the part of the United States* against parties who contract with the United States and who are obligated by such contracts to employ only those persons (except for administrative, supervisory and highly skilled workers) who shall have been formally referred for assignment to work on their undertakings under such contracts by the United States Employment Service, which is legally bound in all such instances to give preference to persons from the public relief rolls.

Third. Whether the refusal of the Court of Claims to accept and act upon credible, adequate and uncontradicted evidence as to the actual availability of relief labor and

other labor which was never referred for assignment to the petitioner in accordance with binding statutory requirements and which therefore, to the great damage of the petitioner, could never, under the terms of petitioner's contract with the United States, be utilized by it in the timely performance of its said contract does or does not constitute such arbitrary and unreasonable judicial action on the part of that Court as to justify corrective action in the premises by the Supreme Court in order to prevent a miscarriage of justice, and to preserve to the petitioner the full scope of its constitutional right to procedural due process of law.

Statutes and Regulations Involved

FEDERAL EMERGENCY RELIEF ACT OF MAY 12, 1933, 48 STAT. 55 AS AMENDED BY ACT OF FEBRUARY 15, 1934, 48 STAT. 351, 15 U. S. C. A., SEC. 721-728

Section 3. (a) There is hereby created a Federal Emergency Relief Administration, all the powers of which shall be exercised by a Federal Emergency Relief Administrator (referred to in this Act as the "Administrator") to be appointed by the President, by and with the advice and consent of the Senate * * *

(b) * * * The Administrator may, under rules and regulations prescribed by the President, assume control of the administration in any State or States where, in his judgment, more effective and efficient cooperation between the State and Federal authorities may thereby be secured in carrying out the purposes of this Act.

EXECUTIVE ORDER No. 6442, NOVEMBER 22, 1933, 15 U. S. C. A., SEC. 721-728, PRESCRIBING RULES AND REGULATIONS UNDER THE FEDERAL EMERGENCY RELIEF ACT OF 1933 * * *

(1) The Federal Emergency Relief Administrator is authorized to assume control of the administration of relief

in any State where, in his judgment, more effective and efficient cooperation between the State and Federal authorities may thereby be secured in carrying out the purposes of said act.

**EMERGENCY RELIEF APPROPRIATION ACT OF APRIL 8, 1935, 49
STAT. 119, 15 U. S. C. A., SEC. 721-728**

Section 10. Until June 30, 1936, or such earlier date as the President by proclamation may fix, the Federal Emergency Relief Act of 1933, as amended, is continued in full force and effect.

**RESOLUTION OF JUNE 29, 1937, 50 STAT. 352, AS AMENDED
JUNE 21, 1938, 52 STAT. 817, 15 U. S. C. A., SEC. 721-728**

TITLE I

• • • there is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to remain available until June 30, 1938, and to be used in the discretion and under the direction of the President, \$1,500,000,000 together with such unexpended balance, as the President may determine, of appropriations made by (a) the second paragraph of the Emergency Relief Appropriation Act of 1936, as supplemented by the First Deficiency Appropriation Act, fiscal year 1937, and (b) section 1 of the Emergency Relief Appropriation Act of 1935, including the unexpended balances of appropriations referred to therein: • • • Provided further, That no portion of the funds hereby appropriated shall be allocated or used for any purpose except to provide relief or work relief for persons in need: • • • Provided, That no person employed on work projects and certified as in need of relief who refuses a bona fide offer of private employment under reasonable working conditions which pays as much or more in compensation for the

same length of service as such person receives or could receive under this appropriation and who is capable of performing such work, shall be retained in employment under this appropriation for the period such private employment would be available: • • •

Sec. 2. In carrying out the purposes of the foregoing appropriation the President is authorized (a) to prescribe such rules and regulations as may be necessary and to utilize agencies within the Government and to empower such agencies to prescribe rules and regulations to carry out the functions delegated thereto by the President • • •

TITLE II

Sec. 201. The Federal Emergency Administration of Public Works (herein called the 'Administration') is hereby continued until July 1, 1939, and until such date is hereby authorized to continue to perform all functions which it is authorized to perform on June 29, 1937. All provisions of law existing on June 29, 1937, and relating to the availability of funds for carrying out any of the functions of such Administrations are hereby continued until July 1, 1939, except that the date specified in the Emergency Relief Appropriation Act of 1936, prior to which, in the determination of the Federal Emergency Administrator of Public Works (herein called the 'Administrator'), a project can be substantially completed is hereby changed from "July 1, 1938" to "July 1, 1939."

RESOLUTION OF JUNE 21, 1938, 52 STAT. 809, 15 U. S. C. A.
SEC. 721-728

Section 10 • • • Provided, That in order to insure the fulfillment of the purposes for which such appropriations are made and to avoid competition between the Works Progress Administration and other Federal or non-Federal

agencies in the employment of labor on construction projects of any nature whatsoever, financed in whole or in part by the Federal Government, no relief worker shall be eligible for employment on any project of the Works Progress Administration who has refused to accept employment on any other Federal or Non-Federal project at a wage rate comparable with or higher than the wage rate established for similar work on projects of the Works Progress Administration: * * *

50 STAT. 533, CHAP. 520, JULY 23, 1937

AN ACT To confer jurisdiction on the Court of Claims to hear, determine, and enter judgment upon the claims of contractors for excess costs incurred while constructing navigation dams and locks on the Mississippi River and its tributaries.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That jurisdiction is hereby conferred upon the Court of Claims to hear, determine, and enter judgment against the United States upon the claims of the several contractors for alleged excess costs incurred in the execution of their respective contracts, entered into since June 16, 1933, for the construction of locks and dams for the improvement of navigation on the Mississippi River and its tributaries, by reason of the Government having promulgated and enforced, as alleged, due, as alleged, to the national emergency and subsequent to the dates of the several contracts, rules and regulations referred to in the several contracts, and misinterpreted and wrongfully enforced or disregarded, as alleged, and rules and regulations not referred to in and inconsistent with the respective contracts, as alleged, which rules and regulations, the enforcement or disregard thereof, deprived the contractors of normal control of their per-

sonnel, as alleged, and further by reason of the Government having failed, as alleged, to supply qualified labor under the labor clauses of the respective contracts, resulting in excess costs, including general overhead and depreciation, to the said several contractors on their respective contracts, as alleged; the said judgment or decrees, if any, to be allowed notwithstanding the bars or defenses of any alleged settlement or adjustment heretofore made, res judicata, laches, or any provision of law to the contrary.

This Act shall not be interpreted as raising any presumption or conclusion of fact or law but shall be held solely to provide for trial upon facts as may be alleged.

Review of such judgment may be had by either party in the same manner as is provided by law in other cases in such court.

Approved, July 23, 1937.

EXECUTIVE ORDER No. 7060, JUNE 5, 1935, PRESCRIBING RULES AND REGULATIONS RELATING TO PROCEDURE FOR EMPLOYMENT OF WORKERS UNDER THE EMERGENCY RELIEF APPROPRIATION ACT OF 1935.—REGULATION No. 2, WORKS PROGRESS ADMINISTRATION.

Section 5. Only persons certified for assignment to work by the United States Employment Service shall be employed on projects: Provided That for the purpose of effectuating the purposes of paragraph I (C) of Executive Order No. 7034 of May 6, 1935, the Works Progress Administrator or the State Works Progress Administrators are hereby authorized in their discretion to modify this requirement in connection with any project not operated under contract.

Section 6. All persons (a) who are employed on projects conducted by the State Emergency Relief Administration and continued by the Works Progress Administration, and

who are otherwise eligible, or (b) who are certified by the United States Employment Service as eligible for employment on projects to be conducted by the Works Progress Administration shall be regarded as continuously certified for assignment to work on projects to be conducted by the Works Progress Administration unless they are requisitioned by the United States Employment Service for employment on other projects, in other public work, or in private industry. (Executive Order No. 7060, Regulation No. 2, was referred to and made a part of the contract sued upon in the present action, in Article 19 thereof as amended R. 28).

Statement of the Case

The contract, the breach of which is the ground of the present action, was entered into by petitioner and the United States on August 5, 1935. This contract was designated ER-W 1101-eng.-3, and by its terms petitioner agreed to furnish all materials and do all the work necessary for the construction of Lock and Dam No. 9, Allegheny River, and alterations to Dam No. 8, Allegheny River.

The contract covered the terms and conditions for a Civil Works Authority Project which was designed and intended for the purpose of giving employment and taking people off public relief rolls. This project had been planned a considerable time in advance of the date of the contract and its time of construction was accelerated in order to give immediately an opportunity for the employment of relief labor. The contract, Article 19 (a), provided that only persons specifically referred for assignment to petitioner by the United States Employment Service should be employed. The contract also provided that preference should at all times be given to persons on the public relief

rolls, and that at least ninety per cent of the persons employed should have been taken from the public relief rolls.

The contract provided that work should be commenced within ten calendar days after receipt of notice to proceed, and should be completed within four hundred and fifty calendar days from the date of notice to proceed. Petitioner received notice to proceed on September 25, 1935.

The contract was finally completed on or about October 6, 1938, after the time for the performance of the contract had been extended altogether 657 days by virtue of nineteen change orders. Part of these delays were caused by changes in the contract quantities and in the character of the work to be performed as specified by directions of the contracting officers acting on behalf of the United States. A large portion of these delays, totalling 149 days, was caused by the inability of the petitioner to obtain from the employment office an adequate number of workmen to staff the job. It is the delays thus caused that are relied upon by the petitioner as the basis and source of most of petitioner's claims for damages. Petitioner claims that the work could have been entirely completed by November 2, 1937, if these delays, which were due to labor shortages exclusively, had been eliminated. While there was a dispute between the parties as to whether the extensions of time granted by the change orders because of labor shortages were correctly figured the Court finding that such delays through 1937 totaled 103 days (R. 54) rather than the 131 days actually granted, the adoption of the lesser figure is of no importance. Work was resumed in 1938 on April 24th, but the undisputed evidence was that it required through June 14, 1938 to repair the damage caused by winter floods. From June 14, 1938 to the completion of the work on October 6, 1938 constituted an elapsed time of 114 days. During this time Change Order No. 18 granted petitioner ad-

ditional time, for labor delays in 1938, of 18 days, which the respondent claimed at the trial should have been 12.30 days. On either basis the elapsed working time in 1938, less the delays caused by labor shortages, was less than the admitted delays prior to 1938, so that regardless of the method of figuring used, petitioner, if furnished an adequate supply of labor, would have completed the contract in 1937.

All of the damages which petitioner claims were due to the carrying over of the work through the winter and spring of 1938, which damages would not have resulted had the project been completed in 1937. Substantially all of these damages had been stipulated as between the petitioner and the attorneys for the Department of Justice. The legal issue is as to whether the damages thus agreed upon are recoverable as against the United States as damages caused by breach of contract on the part of the United States.

The essence of the dispute in this case is as to whether, so long as the limitations which the contract placed upon petitioner's sources of labor were maintained in force and operation, the United States was or was not impliedly obligated to furnish and supply an adequate quantity of reasonably competent labor through its agencies, the United States Employment Service and the Works Progress Administration. If the United States was so obligated, the failure to perform this obligation had a continuous effect in delaying the timely performance of the work by the petitioner. All of the items of damage relied upon in the present petition for certiorari are based upon these delays caused by the labor shortage on petitioner's project.

The instant action was instituted in the Court of Claims on or about October 18, 1940. The petitioner alleged sixteen causes of action, of which twelve were based upon

the ground that the failure of the United States, through its various agencies, to furnish and supply the labor necessary to staff the job was a breach of the implied obligations of the United States under the labor clauses of the contract.

Petitioner introduced ample evidence to establish that there was abundant labor to staff petitioner's project (which only required 600 to 650 men in continuous service) available in the general vicinity where petitioner's project was to be performed. This available labor consisted (a) of men on the public relief rolls, and (b) of unemployed labor not on the public relief rolls, eligible for certification to this project under Executive Order No. 7060.¹ The employment offered by petitioner was the equivalent of private employment. But no adequate steps were taken by the agencies of the United States to facilitate the transfer of relief workers to petitioner's employment, although such a transfer could have been accomplished if the officers of the United States had obeyed the statutory mandate (50 Stat. 352).² And since the requirement that only workers referred for assignment to petitioner by the United States Employment Service could be employed was never waived, petitioner was never able to invade the general labor market and procure the necessary labor force from the ranks of those not on relief and not otherwise formally "referred" to it. There was at all times an adequate supply of employables available for work on this project from the general labor market.

The change orders were accepted by petitioner only on the basis of an express statement, concurred in by the District Engineer, U. S. Engineers Office, that the change orders did not limit or restrict to any extent whatsoever the right

¹ Supra p. 7.

² Supra p. 4.

of the petitioner to make or prosecute any claim whatsoever under the basic contract (R. 67).

The report of the Commissioner of the Court of Claims, duly designated to hear and receive the evidence, was filed on March 11, 1944. Thereafter the case was argued on the merits before the Court of Claims. The opinion of that Court was announced on February 5, 1945. The Court refused recovery to petitioner except for damages to the amount of \$4,669.88, based on petitioner's fourteenth cause of action. That cause of action claimed damages flowing from the Government's raising of wages on W. P. A. projects, which, in turn, forced petitioner to raise wages on its project. The judgment is unconnected with any of the issues raised in this petition.

One judge dissented in such terms as to indicate the acceptance by him of most, if not all, of petitioner's contentions (R. 89).

The judgment of the Court of Claims embodying the conclusions above stated was entered on October 1, 1945.

Specification of Errors

First. The Court of Claims erred in rejecting the petitioner's interpretation of the provisions of Article 19 (a) of the contract which was stated by petitioner in its reply brief in the following language: "We submit that under Article 19 of the contract the defendant undertook the responsibility of supplying plaintiff with sufficient workers to properly staff the job" (R. 79).

Second. The Court of Claims erred in holding that the duty of the Government under the provisions of Article 19 was merely "to apply the provisions of the article with fair consideration for the problems and difficulties of the contractor, and to make it possible for him to get his work

done, if there was not enough relief labor available, but there were persons not on relief who desired to work for the plaintiff" (R. 79).

Third. The Court of Claims erred in holding, in spite of adequate and uncontradicted evidence set forth in the record against its conclusion, and without any direct evidence set forth in the record to support its conclusion, that "it would have made no substantial difference in the plaintiff's labor situation if the Government had cancelled Article 19 of the contract" (R. 82).

Fourth. The Court of Claims erred in failing to give proper effect to the provisions of the Emergency Relief Act of 1937, 50 Stat. 352, 15 U. S. C. A., 721-728,³ and in failing to treat as a breach of contract with petitioner the refusal and failure of officers in charge of work relief in the area where petitioner's project was under operation to remove from the relief rolls in accordance with the statutes of the United States and the regulations of the President properly applicable thereto, sufficient personnel to properly staff the work on petitioner's project, and their refusal or failure to take those other steps and proceedings legally required by the statutes and the regulations, which, if taken, would have had the effect of causing and inducing sufficient numbers of qualified men then and there on the public relief rolls to start and continue actual labor on petitioner's project at such times and under such conditions as would, in fact, have brought about the timely completion of said project.

Fifth. The Court of Claims erred in disposing of petitioner's contention that respondent's violation of the provisions of 50 Stat. 352⁴ was, in legal effect, a breach of con-

³ Supra p. 4.

⁴ Ibid.

tract on the part of the United States on the basis of the following proposition stated in its opinion: "We think it has not been proved that the refusal of the relief authorities to thus forcibly recruit workmen for the plaintiff was so inconsiderate of the plaintiff's difficulties as to be a breach of the Government's implied contract" (R. 81).

Sixth. The Court of Claims erred in holding (R. 84) that "Even if we were of the opinion that the insufficiency of the labor supply was a breach of contract by the Government, we would not have evidence as to the amount of damage resulting from it, for the period from June 15, 1938, to the completion of the work."

Reasons for Granting the Writ

First. It is a matter of great practical importance both to the United States and to the independent contractors that the meaning and legal effect of contractual provisions requiring the employment exclusively of persons referred for assignment by the United States Employment Service, and that ninety per cent of such employees should be taken from the public relief rolls, be clarified and, if possible, settled in a comprehensive manner.

Second. The decisions of the Court of Claims on the question of the interpretation of these standard contractual provisions with reference to the sources of labor to be employed on projects financed by the Government have been in direct conflict, as is evidenced by a comparison of the decision in *Young-Fehlhaber Pile Co. v. United States*, 90 C. Cls. 4, with the decision in the instant case. This doctrinal instability on the part of the Court of Claims not only has produced serious inequality as amongst various contractors who have sought relief in the Court of Claims, but also has created and will continue to create great and harmful

uncertainty as to the future effect of these standard contractual provisions in the minds of all persons called upon to calculate costs and to prepare estimates and bids in connection with any contract with the United States in which these labor clauses are present.

Third. The present controversy is representative of an important group of substantially similar cases which have been decided by the Court of Claims or which are still pending.' In all of these cases the legal effect and significance of standard contractual provisions relating to the employment of relief labor has been in dispute and no clear and comprehensive ruling has yet been enunciated by the Court of Claims.

Fourth. The possible and reasonable application of the constitutional doctrines as to the procedural requirements of due process of law under the terms of the Fifth Amendment to decisions of the Court of Claims reached in contradiction of the available evidence and without any affirmative evidence in the record to support them should be reviewed by the United States Supreme Court, in order to maintain constitutional safeguards and remove "constitutional doubts" as to procedural practices actually followed in an important legislative court.

Conclusion

The foregoing errors and reasons for granting the writ asked for will be discussed in a short brief accompanying this petition.

The writ of certiorari here petitioned for should be allowed by the Supreme Court of the United States.

ROBERT P. SMITH,
CHARLES S. COLLIER,
Attorneys for Petitioner.